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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-758

HARRY SMITH, *et al.*,

Petitioners,

—v.—

DAWN SMITH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CITATIONS TO OPINION BELOW

The opinion of the United States District Court for the Western District of Virginia is reported at 391 F. Supp. 443. The opinion of the Court of Appeals for the Fourth Circuit, dated August 26, 1975, is not yet reported. Both opinions are printed in the Appendix, infra, pages 1 and 29 respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 26, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether this Court's recent decisions under the Establishment Clause of the First Amendment to the Constitution involving a variety of church-state relationships has so eroded the basis of Zorach v. Clauson, 343 U.S. 203 (1952), that all release time programs are unconstitutional.

(2) Whether the program of the Harrisonburg, Virginia School System by which children are released during school hours to attend religious instruction

given at trailers and churches located adjacent to school property is, on its facts, unconstitutional.

STATEMENT OF THE CASE [1]

Since 1923 the School Board of the City of Harrisonburg, Virginia has operated a program under which children attending Grades 3 through 6 in the public schools in the city are released from their classes one hour a week to attend religious instruction given by the Rockingham Council Weekday Religious Education (hereinafter WRE), an affiliate of the Virginia Council of Churches.

From 1923 to 1963 these classes were actually given in the classroom. Since 1963, classes at two schools are held in a trailer owned by WRE which is parked adjacent to the school parking lot. In the third school, it is given at a church building located across the street from the school. While technically not on school property, the trailers are parked at a spot so close to the main school

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[1] The Statement of the Case is taken from the opinion of the District Court (391 F. Supp. at 445-46, 448-49; App., infra, pp. 1-4, 13-14), and of the Court of Appeals (App., infra, pp. 30-31).

building that evidence presented at trial showed that it was actually closer to walk from parts of the school to the trailers than from one part of the school building to another. Likewise, photographs show that when looking from a distance, the trailers actually seem to be part of the school rather than a separate physical entity. (The church building was not a functioning church but rather an abandoned rectory building which was chosen only because of its proximity to one of the schools.)

The WRE classes are given during the school day, the children leaving their regularly scheduled classes and walking to the trailer or church. They return to school after class and continue regular class work. Because of the young ages of the children they are escorted from their classroom to the foot of the stairs by the outside exit by their regular school teacher. At the outside exit the representative of the WRE meets the children and walks them to the trailer building or the church building. At the end of the religious instruction, the process is reversed.

Participation in the program is voluntary. The WRE collects enrollment lists from the schools and mails consent forms to the parents. The cards are then returned to school and collected by WRE. The schools integrate WRE classes into the regular school session from these lists.

While participation is wholly voluntary and WRE representatives are forbidden to enter the schools to encourage enrollment, WRE representatives have come into the school on more than a few occasions to encourage children to attend the program. Those visits were apparently sponsored by individual teachers and have been disclaimed by the school board.

The formal integration of the WRE program by the public school authorities is handled by the principals of each school. According to testimony at trial, WRE is considered to be a regular part of the scheduling process and large blocks of time which would otherwise be scheduled for regular school functions, are set aside for the WRE program.

Nonparticipating children are kept in the classroom while their classmates attend WRE, and formal instruction is suspended until the students in the religious classes return. The evidence at trial indicated that nonparticipating students were not permitted to go ahead on their work and were often given make-work such as washing blackboards during the time that classes were adjourned.

The WRE curriculum is purely Christian in nature and is devised by WRE through its statewide affiliation with the Virginia Council of Churches. The program itself is not an ongoing church-related

program as that found in Zorach v. Clauson, 343 U.S. 203 (1952), where children were released to attend the church program. Rather, the program is specifically designed for introduction into the schools and does not exist but for the participation of the schools.

The program itself is the same as the one which existed when it was held in the classroom. The evidence at trial shows that the physical proximity of the facilities to the schools was crucial to approval of the program, as any need to transport the children to a church facility would have been too disruptive to the school program, according to testimony of the school superintendent. Evidence was also produced at trial that if the program was to be run after school at the individual churches, attendance in the program would suffer, whereas operation of the program during the school day at a site adjacent to the school system insured heavy attendance. Indeed, since the programs were for very young children, they would be very difficult, if not impossible, to run after school.

In December 1974 suit was filed in the United States District Court for the Western District of Virginia, Harrisonburg, Virginia, challenging the constitutionality of the program. The plaintiffs were parents whose children were subject to the program who have chosen not to allow

their children to participate for personal religious reasons, parents whose children were subject to the program when they were attending school, and parents whose children will be subject to the program when they reach the proper age.

After a full evidentiary hearing, Judge James C. Turk found the program unconstitutional. The School Board and WRE appealed to the United States Court of Appeals for the Fourth Circuit which reversed the decision of the District Court on August 26, 1975.

WHEN AND HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The sole issues involved in this litigation have been issues of federal constitutional law. At trial, petitioners submitted memoranda on the issues of constitutional law involved in this case. Likewise, the evidence that was taken at trial related wholly to the constitutional issue of whether or not the release time program of Harrisonburg, Virginia violated the Establishment Clause of the First Amendment to the Constitution. The same issues were raised, briefed and argued on appeal.[1]

The opinions of both the District Court and the Court of Appeals rest solely on the federal constitutional issues involving freedom of religion.

REASONS FOR GRANTING THE WRIT

Since 1947, this Court has decided numerous cases involving the relationship between education and the Establishment Clause of the First Amendment. Those cases have concerned religious activities connected with and trenching upon the operation of the public schools, and the public support of private educational institutions supported by religious groups. During that period of time, most issues involving either religious practices in the public schools or government aid to religious schools have been resolved. Paradoxically, however, resolution of those issues has exacerbated the uncertainty of the constitutionality of release-time programs as reflected in the inherent contradictions between McCollum ex rel Illinois v. Board of Education, 333 U.S. 203 (1948) and Zorach v. Clauson, 343 U.S. 203 (1952). We urge that the time has come to reexamine Zorach.

1. The district court in this case repudiated Zorach v. Clauson, 343, U.S. 306 (1952), regarding it as no longer viable in the light of this Court's more recent decisions construing the Establishment Clause.

Reviewing the release-time program in this case, the district court held that the degree of cooperation between the religious body and the public school system

created "an impression of an endorsement of the program and in so doing, obscure[d] any distinction between the religious and secular classes and teachers" (App., infra, p. 15), and that the principal effect of that cooperation upon the more impressionable elementary school children was to advance the Weekday Religious Education Program. It said of Zorach (App., infra, pp. 6-7):

> Aside from factual distinctions, this Court does not believe that Zorach is necessarily dispositive of the present case. This court must, of course, follow the decisions of the Supreme Court, but much has been written by the Court concerning the "establishment of religion" since the decision in Zorach; and, "there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case."

In reversing the district court and approving the release-time arrangement here on the authority of Zorach, the Court of Appeals said (App., infra, p. 36):

> If we were to decide this case solely by direct application of the tripartite test recently restated in Meek v. Pittenger, ___ U.S. ___ (May 1975), we would be inclined to agree with the district court's overall conclusion that the Harrisonburg release-time program is invalid. *** Although the district court's reasoning is persuasive, its opinion was filed before Meek was decided. In Meek the Court expressly cited Zorach as viable authority. ___ U.S. at ___. Although Zorach was decided many years before the Court fashioned the tripartite test, the Meek citation indicates that Zorach is not inconsistent with the tripartite test. Indeed, Zorach illuminates the test. Therefore, it is our duty to follow Zorach and to understand the

> modern test in the light of Zorach's continuing viability.

Speaking of Zorach and McCollum v. Board of Education, 333 U.S. 203 (1948), the Court of Appeals revealed its difficulty with and dissatisfaction in attempting to resolve the contradictions between the two cases (App., infra, pp. 32-33).

> The cases have never been repudiated, although neither the Court nor commentators have wholly succeeded in harmonizing them. *** In shaping the modern tripartite test, the Court has not rejected its early Religion Clauses cases, but instead has purported to distill them. *** Our task, therefore, is to apply the modern test in a fashion consistent with the results in McCollum and Zorach. [Footnote omitted.]

Clearly, the Court of Appeals reversed the District Court on the limited ground that, notwithstanding the confusion over the law relating to release time, only this Court had the authority explicitly to overrule Zorach if demanded by

the logic of subsequent cases. We urge that the Court do so in this case.

2. While there is no need in this petition to track the elaborate discussion in the Court's decisions involving the Establishment Clause, it has been the position of the petitioners throughout this case that the tripartite test adopted first in Abingdon School District v. Schempp, 374 U.S. 203 (1963) and reaffirmed most recently in Meek v. Pittenger, ___ U.S. ___ (1975), has so undermined the logic and reasoning of Zorach that it is no longer valid law. See Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Commission, 397 U.S. 664 (1970); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The tripartite test requires examination as to whether the particular program has a secular purpose, whether its primary effect advances or inhibits religion, and whether it forces excessive entanglement between government and religion. Lemon v. Kurtzman, supra at 612-13. We believe that uniformity requires application of that test to release-time programs and, once applied, requires that those programs be declared unconstitutional. It is not necessary at this time to elaborate those arguments. It is enough to say that the time has come to reexamine Zorach in light of subsequent decisions across a period of twenty-five years which clearly suggest

that the reasoning of Zorach is now substantially undermined.

3. Both the McCollum and Zorach opinions agree that unconstitutional religious intrusion into the public schools exists when the relationship between the school and the religious body has the effect of awarding the religious activity an official stamp of approval. Looking at the facts of this case, it is clear that the arrangement of the Harrisonburg program is distinctly a version of McCollum. Significantly, the program in Harrisonburg has continued in virtually the same form since 1923. The only difference in the program was that in 1963 religious education was moved from the classroom to an adjacent trailer and to a very nearby church building. No other changes were made. Clearly, the program in Harrisonburg was not designed to meet Zorach, but rather was a delayed reaction to the Abingdon decision.

Thus, as an alternate means of disposition, a clear factual distinction can be made between this case and Zorach, though this would in no way dilute petitioners' primary attack on Zorach in its entirety.

CONCLUSION

For the reasons set forth above,

the Writ of Certiorari should be granted.

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November 24, 1975

APPENDIX

OPINION OF
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

HARRY SMITH, ET AL.
Plaintiffs,

v.

DAWN SMITH, ET AL.
Defendants.

CIVIL ACTION NO. 74-116

OPINION

By: James C. Turk
Chief U.S. District Judge

This case presents the question of whether the participation of the Harrisonburg public schools in a program whereby students are released from school for the purpose of attending religious instruction classes violates the First Amendment of the United States Constitution as incorporated by the Fourteenth Amendment. The named plaintiffs are residents and taxpayers of the City of Harrisonburg, Virginia whose children are now, have in the past, or will be attending public schools in Harrisonburg which participated in the "release time" program here challenged as unconstitutional.

The operative facts are not significantly in dispute and the court finds them to be as follows: Weekday Religious

Education Program (WRE) is a non-profit association supported by the Virginia Council of Churches which seeks to provide religious instruction to children in Harrisonburg. The program began in 1923 with the religious instruction taking place in the school classrooms; however in 1963 WRE began using a trailer parked on the street adjacent to the schools or a nearby church as a classroom. Presently, the program is operated in three elementary schools in Harrisonburg; at two of the schools children in grades 3 through 5 participate and in the other school the participating children are in grades 2 through 4.

WRE obtains a list of the students in the participating grades from the schools and from these lists mails cards to the parents of the children asking them if they consent to their child's participation in the program. The cards are then deposited by the children in a box in the classroom and are eventually picked up by WRE. WRE thereafter notifies the schools as to which children have parental permission to attend the religious instruction classes. A notation is made by school officials in the student's file indicating whether the child has permission to be absent during the release time period. WRE personnel are not permitted to enter the schools to solicit children to participate in the program. Employees

of the public schools do not distribute the parental consent cards or assume responsibility for their return; and they are not permitted to encourage the children either directly or indirectly to participate in the program. 1 / Even if parental consent is given, a child who does not want to attend the WRE classes is not compelled to do so.

At two of the elementary schools a mobile trailer owned by WRE is parked on a public street next to the school when class is held. The trailer is not allowed to be parked on school property. At the third elementary school, the children attend class at a nearby church. Twenty-seven classes of children participate in the program with approximately one hour of instruction per

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1 / Plaintiffs' evidence indicated that in the past WRE teachers had been permitted to solicit children in the school classrooms and that public school teachers had encouraged the students to attend WRE classes. The court does not disbelieve this evidence, but on the basis of all the evidence presented finds that these practices are contrary to the policy of the public school system and would not be tolerated if brought to the attention of school officials.

week given to each class. Instruction is given to one class (25 to 30 children) at a time, and the principals of the individual schools integrate the WRE classes into the regular classroom scheduling, with different classes being released throughout the school day during the week. Those students who do not attend WRE classes remain in class under the supervision of a teacher although they do not receive formal instruction and do not work on their lessons. The evidence indicates that during WRE instruction the nonparticipating students do things such as helping the teacher grade papers, cleaning the blackboard and entertaining themselves.

Although the Harrisonburg City School Board approves the WRE program in the sense that it allows the schools to schedule organized released time classes as an accommodation to WRE and those members of the community approving of the program, it does not approve or disapprove of the substance of the instruction offered by WRE. The School Board does not make school property or personnel available to WRE and does not directly expend money to assist WRE.

The constitutional issue presented by this case has as its focal point the case of Zorach v. Clauson, 343 U.S. 306

(1952) in which the Supreme Court upheld the constitutionality of a release time program factually similar to that involved in this case. In Zorach the challenged program had been established by New York statute and regulations as supplemented by regulations promulgated by the New York City School Board. Under the program a student was released from school during the school day on the written request of his parents to attend religious instruction classes or services at churches away from the school grounds with those students not released remaining in the classrooms. The court rejected the claim that the program inhibited the "free exercise" of religion on the basis that there was no evidence that coercion was applied by school authorities to influence students to take religious instruction. With respect to the claim that the program amounted to an unconstitutional "establishment of religion," the court distinguished McCollum v. Board of Education, 33 U.S. 203 (1948) which held unconstitutional on "establishment" grounds an Illinois release time program in which the religious instruction actually took place in the school classrooms.

The plaintiffs herein challenge the Harrisonburg program on both "establishment" and "free exercise" grounds, but as in Zorach, this court perceives the substantial constitutional issue presented

to be whether this particular program amounts to an "establishment" of religion. The court is of the opinion that plaintiffs' contention that the administration of the program prohibits their free exercise of religion is simply not supported by the facts.

There can be little doubt that the decision in Zorach is a strong precedent in favor of the constitutionality of the Harrisonburg program, for the conclusion is inescapable that at least since 1963 when WRE began using a mobile trailer and a local church for a classroom, the School Board and WRE have sought to come within the constitutional constraints of that decision. Although Zorach is factually similar to the present case, there are distinctions which are of some significance which will be discussed below. But, aside from factual distinctions, this court does not believe that Zorach is necessarily dispositive of the present case. This court must, of course, follow the decisions of the Supreme Court, but much has been written by the Court concerning the "establishment of religion" since the decision in Zorach; and, "there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new

lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." Rowe v. Peyton, 383 F. 2d 709, 714 (4th Cir. 1967), aff'd, 391 U.S. 54 (1968). Accord, Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 217 (2nd Cir. 1942), aff'd, 317 U.S. 501 (1943); Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), probable jurisdiction noted, 415 U.S. 911 (1974); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), aff'd, 352 U.S. 903 (1956); Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (S.D. Va. 1942), aff'd, 319 U.S. 624 (1943). 2/

2/ In Barnette Judge Parker of the Fourth Circuit in declining to follow the decision in Minersville School District v. Gobitis, 310 U.S. 586 (1940) stated for a three-judge district court:

> "Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower (cont'd.)

Footnote 2 Continued.

> courts as binding upon them if any orderly admin[istration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the] seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika, 316 U.S. 584, 62 S. Ct. 1231, 1251, 86 L. Ed. 1691. The majority of the court in Jones v. City of Opelika, moreover, thought it worthwhile to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believ- (cont'd)

In several cases subsequent to Zorach the Supreme Court has faced the problem of determining whether particular government programs affecting religious institutions unconstitutionally breached the wall of separation between church and state. In the face of establishment clause challenges the court has upheld Sunday Closing Laws, McGowan v. Maryland, 366 U.S. 420 (1961); the loaning of books on secular subjects to students attending sectarian schools,

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Footnote 2 Continued.

> ing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guarantees." 47 F. Supp. at 252-253.

Board of Education v. Allen, 392 U.S. 236 (1968); state property tax exemptions for religious organizations, Walz v. Tax Commission, 397 U.S. 664 (1970); and federal construction grants to church-related colleges and universities provided that the facilities not be used for sectarian instruction or religious worship, Tilton v. Richardson, 403 U.S. 672 (1971). 3 / On the other hand, the court has held unconstitutional under the Establishment Clause state programs requiring Bible readings and recitation of the Lord's Prayer in public schools, Abington School District v. Schempp, 374 U.S. 203 (1963); recitation of a non-denominational state prayer in the public schools, Engel v. Vitale, 370 U.S. 421 (1962); an Arkansas statute prohibiting the teaching of evolution in public schools, Epperson v. Arkansas, 393 U.S. 97 (1968); state programs providing supplements to teacher's salaries, textbooks and instructional materials for secular services rendered by religious schools, Lemon v. Kurtzman, 403 U.S. 602 (1971); and state programs providing public grants for maintenance and repair

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3 / In Tilton the court did reject as unconstitutional a clause in the federal statute which allowed the condition that the facilities not be used for sectarian purposes to expire after twenty years.

to sectarian schools and tuition reimbursement and tax deductions to the parents of children attending such schools, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

In Walz v. Tax Commission, supra, the court discussed the difficulty in finding a neutral course which would accommodate both the "free exercise" and "establishment" clauses of the First Amendment and was frank in pointing out the "internal inconsistency in the opinions of the Court. . . ." 397 U.S. at 668. The court went on to state with respect to its earlier decisions:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deductible from the First Amendment and all that has been said by the court is this: that we will not tolerate either governmentally established religion or governmental interference

> with religion. Short of those expressly prescribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 397 U.S. at 669.

The following year in Lemon v. Kurtzman, supra, the court was even more explicit in defining the judicial criteria to be applied in judging whether a particular government program breaches the constitutional wall between chruch and state:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Educa-

> tion v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, at 674." 403 U.S. at 612-613.

This tripartite test which was subsequently described as "a product of considerations derived from the full sweep of the Establishment Clause cases," Committee for Public Education v. Nyquest, supra at 772, provides the governing standards to be applied to the case at bar.

The purpose of the Harrisonburg public school system's participation in the WRE release-time program is that of accommodating parents, students and the community. As stated by the Superintendent of the Harrisonburg public schools in his affidavit, "[t]he Harrisonburg public schools will seek to accommodate any individual or group which has the written consent of parents or children so long as the release can be done in an orderly manner not unduly disruptive to the educational process." The public school system does not approve or review the materials or instruction offered by WRE and offers no financial assistance to it. Thus, in the defendants' view, the secular purpose of the service

provided by the schools to WRE is merely that of accommodating parents in the community and is no different than that afforded any parent who desires to have his child excused from school temporarily for any of a variety of reasons. The court can accept defendants' stated secular purpose of the program as legitimate. The court finds that the intent of the public school officials in integrating WRE classes into the schools' schedules is neither "the advancement or inhibition of religion," Abington School District v. Schempp, supra at 222, but rather is simply to accommodate certain parents and their children who approve of the program.

Secondly, the principal or primary effect of the program must also neither advance nor inhibit religion, and it is in this respect that the court finds that the WRE program fails to satisfy constitutional standards. It is clear that WRE is dependent on the public schools for its success in providing religious instruction to a large number of young children in the community. Without the active participation of the public schools in the form of scheduling WRE classes throughout the school day and supervising those students who do not participate, WRE's mission would undoubtedly not reach the quantity of students that it now does. Nor would the quality of the program in the eyes of the children

be the same, for as the program now exists the WRE classes are distinguishable from the regular secular classes only in that they are conducted in a trailer next to the school or a nearby church by a different teacher; but these distinctions would seemingly make little or no substantive impression on the elementary school children involved in the program. The cooperation of the public schools in administering the WRE program can hardly help but create an impression of an indorsement of the program and in so doing obscure any distinction between the religious and secular classes and teachers. See Abington School District v. Schempp, supra at 261-263 (1963) (Brennan, J. concurring). In this regard, the fact that the WRE program is directed toward elementary school children in grades two through five as opposed to older more discriminating students is a significant factor in terms of WRE's mission, and the assistance it receives from the public schools in achieving its purpose. See Tilton v. Richardson, supra at 685-686. It is this "sponsorship" and "active involvement," Walz v. Tax Commission, supra at 668, in the form of the schools' scheduling of WRE classes which has the principal or primary effect of advancing the religious instruction offered by WRE and hence brings the program into conflict with the Establishment Clause of the Constitution.

This degree of cooperation between WRE and the Harrisonburg public schools may also serve to distinguish Zorach, assuming that decision remains a viable precedent despite the analysis adopted by the Court in Lemon v. Kurtzman, supra, and its progeny. Under the program considered in Zorach the students were released "to religious centers for religious instruction or devotional exercises." The obvious factual distinction in the case at bar is that in Harrisonburg the children at two of the schools are released to a mobile trailer parked adjacent to the school. 4 / As noted above, the

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4 / Plaintiffs' counsel has submitted additional information regarding the program considered in Zorach in an attempt to distinguish that case from the present case. This information indicates that under the New York City program considered in Zorach the students were released for religious instruction during the last hour of the school day. This would indicate that there was a lesser degree of interrelationship between the secular and religious instruction under the New York program than in the Harrisonburg situation. However, the Supreme Court made no mention of this factor in its decision in Zorach, and this court accordingly considers it to be irrelevant as a basis for distinguishing Zorach.

proximity of the trailer to the school and the integration of WRE classes with secular classes is significant in that the separation between the secular and the religious classes and the authority of the teachers of each is diminished. However, of greater significance in distinguishing Zorach is the fact that WRE, as an organization with a religious purpose, is dependent on the active cooperation and accommodation of the public schools. Such an interrelationship did not appear to exist between one organization and the public school system in Zorach. Although the Court in Zorach distinguished its earlier decision in McCollum on the basis that school property was not used for religious education under the New York program and "the public schools [did] no more than accommodate their schedules to a program of outside religious instruction," 306 U.S. at 315, the court also stated that "[t]he problem, like many problems in constitutional law is one of degree." 306 U.S. at 314. Thus, the court cannot assess the constitutionality of this particular release time program by blind generalizations. As stated in the recent case of Lemon v. Kurtzman, supra at 614, "judicial caveats against entanglement must recognize that the line of separation, [between church and state] far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relation-

ship." 5 /

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5 / In McCollum v. Board of Education, supra at 225, 226, the court also expressed the idea that the specific facts and circumstances surrounding a given release time program must be considered in assessing its constitutionality:

> "Of course, 'release time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'release time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely (cont'd)

The fact that WRE is apparently the only organization offering religious instruction by means of a release time

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Footnote 5 Continued.

> of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the court."
>
> "The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of separation is to be applied."

program in the public schools in Harrisonburg, and over the years has established a close working relationship with the public school system upon which it depends in order to achieve its purpose presents a greater degree of involvement between church and state than that stated in Zorach. However, this court realizes that Zorach is not readily distinguishable, and prefers to base its legal conclusions in the present case on the fact that the Harrisonburg program fails to withstand the constitutional analysis adopted by the Supreme Court subsequent to its decision in Zorach, and specifically the standard which considers "the principal or primary effect" of the government involvement. As stated above, the Harrisonburg release time program fails to withstand such an analysis.

Because of its conclusion that the primary effect of the release time program advances WRE's mission, the court need not consider the degree of entanglement between church and state caused by the program. It should be noted though that the involvement of the public schools in this particular case does present constitutional "entanglement" problems at least insofar as there appears to be a substantial potential for political divisiveness based on

religious considerations. 6 /

Finally, the court feels constrained to comment on the issue of the "free exercise of religion" raised by both sides to this case. As already stated, the court does not find that the release time program operates so as to inhibit the plaintiffs' free exercise of their religion. Defendants, however, contend that those students choosing to participate in the program have a constitutional right to do so. In effect defendants are arguing that to sustain the plaintiffs' Establishment Clause argument would be to infringe the constitutional right of other students and

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6 / In Lemon v. Kurtzman, supra at 622 the court commented with respect to this type of entanglement:

> "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

their parents to the free exercise of their religion. This argument cannot be ignored because the right of individuals to freely exercise their religious beliefs is as protected by the Constitution as is the right of individuals to prevent their government from establishing a religion. The defendants' argument in this regard clearly points out the inherent tension between the Free Exercise and Establishment Clauses of the First Amendment to the Constitution. In Walz v. Tax Commission, supra, Mr. Chief Justice Burger commented in this regard:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668-669.

The appeal of defendants' free exercise argument is particularly acute in the present case where the religious education program has been an accepted part of the school curriculum for over fifty years and is obviously popular with an overwhelming majority of the community. However, this long-standing, accepted relationship between WRE and the public schools even more cogently demonstrates

how WRE has become an unconstitutional "established" part of the public school system.

It is well established that "a violation of the Free Exercise Clause is predicated on coercion," Abington School District v. Schempp, supra at 223. It is true, as defendants point out, that the public school system controls much of a student's life between ages five and eighteen; but this court cannot conclude that without a religious instruction period during school hours students or their parents are prevented or coerced in any way from pursuing their religious beliefs. The right of individuals to freely practice their religious beliefs does not encompass the right to use the government to that end. This thought was expressed in Abington School District v. Schempp, supra, at 226:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or

> effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."

On the other hand, a violation of the Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, supra at 430. As already stated, the primary effect of the WRE program in the Harrisonburg schools is to advance a particular religious program, and it is for this reason that the Establishment Clause has been violated. In so concluding, this court has admittedly favored the position of a very small minority of the Harrisonburg community over that of the majority, but the very purpose of the religion clauses of the First Amendment was to insure that the sensitive issues of an individual's religious beliefs would be beyond majority control. As stated in Abington School District v. Schempp, supra at 226:

> "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free

> exercise to anyone, it has never meant that the majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943):
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> 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to...freedom of worship...and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'" (emphasis original.)

On the basis of the reasons and authority stated, the plaintiffs' prayer for injunctive relief restraining the defendants from further participation in the WRE program described herein will be

granted. Plaintiffs' other prayers for relief and for costs and fees will be denied. An order in conformity with the conclusions stated in this opinion will be entered on this day; however, should defendants choose to appeal this judgment, on appropriate motion, this court will stay the effect of its order pending such appeal.

This opinion constitutes the findings of fact and conclusions of law constituting the basis for the granting of injunctive relief as required by Rule 52(a).

CIVIL ACTION NO. 74-116

ORDER

In accordance with the opinion filed in this proceeding, it is ADJUDGED and ORDERED as follows:

(1) That the defendants Dawn Smith, Jack S. Neff, Ray M. Wine, Daniel M. McFarlain, Elon W. Roads and Robert A. Furr, constituting the Board of Education for the City of Harrisonburg; Wayne King, Superintendent of Schools for the City of Harrisonburg; and Robert E. Horst, Principal of Keister Elementary School be, and they hereby are, enjoined from further participation in the Week-Day Religious Education Program in the City of Harrisonburg including the scheduling of WRE classes and the releasing of students to attend such classes during school hours.

(2) That defendants Oliver Byerly, President and Katheryn Roler, Executive Secretary of the Week-Day Religious Education in Harrisonburg be, and they are, enjoined from acting in concert with public school officials in scheduling and conducting WRE classes for public school students during school hours in the City of Harrisonburg.

(3) That the mandate of this order is stayed during the pendency of any

appeal to the Court of Appeals for the Fourth Circuit.

(4) Defendants are exempt from the requirement of having to post a bond for costs on appeal since the Defendant School Board is an agency of the City of Harrisonburg, Virginia.

ENTER: This 14th day of March, 1975.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1478

HARRY SMITH, et al.,

Appellees,

v.

DAWN SMITH, et al.,

Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg.
James C. Turk, Chief Judge.

Argued June 11, 1975
Decided August 26, 1975

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges

WINTER, Circuit Judge:

The district court held unconstitutional and enjoined the enforcement of the Harrisonburg, Virginia, release-time program whereby public school students are released during school hours for religious instruction by the Rockingham Council of Week-Day Religious Education (WRE). We think that controlling Supreme Court authority requires the opposite result. We reverse and direct dismissal of the complaint.

I.

WRE is a nonprofit organizations supported by the Virginia Council of Churches. It has been providing religious instruction in Harrisonburg since 1923. For forty years, the teaching took place in school classrooms. Since 1963, WRE classes have been held in trailers parked on streets adjacent to the schools or in nearby churches.

The challenged program operates in three elementary schools. WRE obtains the schools' enrollment lists and mails cards to the parents asking if they consent to their children's participation in the program. The children deposit the cards at school; WRE collects them and informs the school which children should be released. Public school officials do not encourage the children to attend WRE classes. WRE officials do not enter the schools to solicit students.

Twenty-seven classes of children receive approximately one hour of WRE instruction a week. The public school principals and WRE officials work together to coordinate their schedules. Each WRE class is drawn from a regular school class; children who do not participate remain in the classroom but the teacher does not provide formal instruction for this small minority of the class.

Although it concluded that the program was invalid, the district court admitted that the Harrisonburg release-time program is "not readily distinguishable" from the New York City program which the Supreme Court held constitutional in Zorach v. Clauson, 343 U.S. 306 (1952). It held, however, that Zorach was "not necessarily dispositive" in view of the Supreme Court's adoption of a tripartite test for applying the Establishment Clause:[1] the challenged state action is valid if it has a (1) secular purpose,[2] (2) its primary

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1. The test was most recently stated in Meek v. Pittenger, ___ U.S. ___, at ____ (May 19, 1975). See Also Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

2. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) in which the Court held invalid an Arkansas statute prohibiting the teaching of Darwinish. The Court dondemned the statute because it was not religiously neutral but instead was part of an attempt to "blot out a particular theory because of its supposed conflict" with the Bible. 393 U.S. at 109.

effect neither advances nor inhibits religion,[3] and (3) it does not excessively entangle the state with religion.[4] Applying this test, the district court found the Harrisonburg release-time program unconstitutional, because its effect was found to advance the WRE's religious training.

The Supreme Court's two release-time decisions to which we must look are Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948), which invalidated a Champaign, Illinois, program, and Zorach v. Clauson, supra, which reached the opposite result as to a New York City program. The cases have never been repudiated, although neither the Court nor commentators have wholly succeeded in harmonizing them. See Note, The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 Yale L.J. 1202, 1228-33 (1974). In shaping the modern tripartite test,

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3. This part of the test was developed and applied in Abington School District v. Schempp, 373 U.S. 203, 223 (1963), in which the Court held unconstitutional school prayers. See also its application in Board of Education v. Allen, 392 U.S. 236, 243 (1968), in which the Court validated a free textbook program which included parochial schools.

4. The "entanglement" concept was developed in Walz v. Tax Commission, 397 U.S. 664 (1970), holding constitutional tax exemptions to religious organizations.

the Court has not rejected its early Religion Clauses cases, but instead has purported to distill them.[5] Our task, therefore, is to apply the modern test in a fashion consistent with the results in McCollum and Zorach. We turn first to McCollum and Zorach.

In McCollum, the religious instructors took over the public school classrooms; non-participating students went elsewhere in the building. The school approved of the religious instructors and participated in recording the attendance of students in the religious instruction classes. This scheme was held unconstitutional.

In Zorach, the school system simply released students during the school day upon written request of their parents. These

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5. In Meek v. Pittenger, ___ U.S. ___, at ____ (May 19, 1975), the Court said the three tests "constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting an establishment of religion,' and thus provide the proper framework of analysis for the issues presented in the case before us."

In Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973), the Court said "the now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases."

students attended religious classes off the school premises. The schools received reports of the children's attendance at these classes.

The majority opinion by Mr. Justice Douglas in Zorach offered three possible distinctions between this program and the one invalidated in McCollum. The Zorach program involved [1] "neither religious instruction in public school classrooms [2] nor the expenditure of public funds." 343 U.S. at 308-09. In McCollum, on the other hand, "the classrooms were used for religious instruction and [3] the force of the public school was used to promote that instruction." 343 U.S. at 315. The second and third distinctions seem, in fact, to depend on the first and crucial distinction:[6] in McCollum, the public school

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6. This point is made in Note, "The 'Released Time' Cases Revisited: A Study of Group Decisionmaking by the Supreme Court," 83 Yale L.J. 1212, 1230 (1974). The expenditure of public funds in McCollum consisted of little more than the loan of the school classrooms to the religious instructors.

The "force of the public school" was used to promote the religious instructions also primarily because the classrooms were turned over to the religious instructors. Since the students were compelled by law to attend school, they were therefore compelled at least to be in school when the religious instructors arrived. They could leave the classroom, but to some extent the law encouraged their participation in the religious education. Concurring in

(continued on next page)

turned its classrooms over to the religious instructors; in Zorach, the schools only adjusted "their schedules to accommodate the religious needs of the people." 343 U.S. at 315.[7]

In the instant case, the accommodations of the school program to religious training were generous and thoroughgoing, but the public school classrooms, where the students were compelled by state law to be, were not turned over to religious instruction. Therefore, the case is indistinguishable from and

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Abington School District v. Schempp, 374 U.S. 203, 230 (1963), Justice Brennan refined the argument: "[T]he McCollum program placed the religious instructor...in precisely the position of authority held by the regular teachers of secular subjects, while the Zorach program did not. The McCollum program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids." 374 U.S. at 262-63.

7. In Zorach, Justices Black, Frankfurter and Jackson dissented and filed separate opinions. All took the position that McCollum was indistinguishable. The opinion of Justice Jackson eloquently and persuasively argued that the state exercised compulsion to further sectarian religious education, notwithstanding that actual instruction did not take place in the classrooms of public schools, but his views were rejected.

controlled by Zorach. Under it, the Harrisonburg release-time program must be constitutional.

III.

If we were to decide this case solely by direct application of the tripartite test recently restated in Meek v. Pittenger, ___ U.S. ___ (May 19, 1975), we would be inclined to agree with the district court's overall conclusion that the Harrisonburg release-time program is invalid. The district court did not find that the first and third parts of the test were violated. In this, it was correct.

The purpose of the Harrisonburg release-time program, like the Zorach program, is secular--the schools aim only to accommodate the wishes of the students' parents. Nor does the Harrisonburg program involve more entanglement between the school administration and the religious authorities than was present in the Zorach program.

With respect to the effect of the program's advancing or inhibiting religion, the district court found that the necessary effect of the cooperation between the public school officials and the WRE is to "create an impression of an indorsement of the program and in so doing obscure any distinction between the religious and secular classes and teachers." Moreover, the program is directed toward elementary school children, and they are more likely to be susceptible to this "impression of...in-

dorsement." Therefore, the district court reasoned, the principal or primary effect of the cooperation which it enjoined is to advance WRE's program. Under the second part of the modern test, it concluded, the program is unconstitutional.

Although the district court's reasoning is persuasive,[8] its opinion was filed before Meek was decided. In Meek the Court expressly cited Zorach as viable authority. ____ U.S. at ____. Although Zorach was decided many years before the Court fashioned the tripartite test, the Meek citation indicates that Zorach is not inconsistent with the tripartite test. Indeed, Zorach illuminates the test. Therefore, it is our duty to follow Zorach and to understand the modern test in the light of Zorach's continuing viability. McCray v. Burrell, ____ F.2d ____, at ____ (4th Cir. 1975), cert. filed, ____ U.S. ____ (1975).

The necessary effect of the release-time program in Zorach must have been much the same as the effect which the district court discerned in the instant case. Since Zorach is still good law, it must be that this effect is indirect or incidental rather than principal or primary. As the Court has recently reasserted, with a citation to Zorach, "not all...programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution." Meek v. Pittenger, ___ U.S. ___, at ___ (May 19, 1975).

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8. See n. 7.

We take this language to mean that the primary effect of the public school's release-time program in Zorach must be seen as simply the innocuous diminishing of the number of children in school at a certain time of day. According to this view, public school cooperation with the religious authorities in Zorach and the instant case is a largely passive and administratively wise response to a plenitude of parental assertions of the right to "direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). See also Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923). With these premises, our conclusion must be that the Harrisonburg public school's cooperation with the WRE program by itself does not necessarily advance or inhibit religion. Therefore, the Harrisonburg release-time program is not unconstitutional, under the modern test, as understood in the light of Zorach's apparent continuing validity.

IV.

The judgment of the district court must be reversed and it should dismiss the complaint.

REVERSED.